Nos. 01-653, 01-657

JUN 21 2002

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

ARCTIC SLOPE REGIONAL CORP., *et al.*,
Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS NEXTWAVE PERSONAL COMMUNICATIONS INC. AND NEXTWAVE POWER PARTNERS INC.

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QUESTION PRESENTED

Section 525 of the Bankruptcy Code provides that "a governmental unit may not . . . revoke . . . a license . . . to . . . a person that is . . . a debtor under this title . . . solely because such . . . debtor . . . has not paid a debt that is dischargeable" in bankruptcy. 11 U.S.C. § 525(a). The question raised in the petitions is whether the court of appeals correctly held that the plain language of § 525(a) precluded the Federal Communications Commission from revoking licenses held by a debtor in bankruptcy solely because such debtor had not made installment payments on debts that are dischargeable in bankruptcy.

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING

Respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc. are both wholly owned subsidiaries of NextWave Telecom Inc. ("NTI"). No publicly traded company owns 10 percent or more of NTI's stock.

In addition to the Petitioners in Nos. 01-653 and 01-657, several intervenors in the proceeding below are also parties to this proceeding under Rule 12.6. They include the following:

AT&T Wireless Services, Inc. (more than 10 percent of the stock of which is owned by NTT DoCoMo);

BellSouth Corporation;

BellSouth Cellular Corporation;

Cellco Partnership d/b/a Verizon Wireless (which is owned by Verizon Communications Inc. and Videophone Group PLC);

Cellular Telecommunications Industry Association;

Dobson Communications Corporation (more than 10 percent of the stock of which is owned by AT&T Wireless Services, Inc.);

Nextel Communications, Inc. (more than 10 percent of the stock of which is owned by Motorola, Inc., and its subsidiaries);

Sprint Spectrum L.P. d/b/a Sprint PCS (which is wholly owned by Sprint Corporation); and

TeleCorp PCS, Inc. (more than 10 percent of the stock of which is owned by AT&T Wireless Services, Inc.).

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BRIEF FOR RESPONDENTS

The Bankruptcy Code is essential to the efficient functioning of the Nation's market economy. The Code responds to the problem of insolvency with a comprehensive framework that fosters rehabilitation of insolvent businesses and ensures fair and equal treatment of creditors – thereby ameliorating the serious social costs and market inefficiencies of liquidation.

This case involves an effort by the Federal Communications Commission ("FCC") to exempt itself from a critical Code provision – Section 525 – that protects reorganizing debtors holding government licenses. Section 525 forbids government agencies from revoking licenses solely because a debtor does not pay a debt that is dischargeable in bankruptcy. 11 U.S.C. § 525(a). In this case, the Court of Appeals applied the plain text of § 525 to invalidate the FCC's attempt to revoke the spectrum licenses of NextWave Telecom Inc. and its affiliates ("NextWave") solely because NextWave deferred debt payments to the FCC while reorganizing.

The facts of this case vividly confirm the importance of § 525. In 1996 and 1997, NextWave participated in auctions for spectrum set aside by the FCC for businesses with limited assets and capital, and entered into a long-term installment payment agreement with the FCC to pay for the licenses. As a result of a marketwide collapse in spectrum prices, NextWave was forced to file for bankruptcy protection in June 1998. NextWave followed all applicable bankruptcy rules and procedures in order to reorganize and maximize value for its creditors. The FCC actively participated in the bankruptcy process, aggressively protecting its interests as a secured creditor. In December 1999, 18 months after filing for bankruptcy, NextWave proposed a plan of reorganization that provided for full payment to the FCC and all other creditors, which would have quickly put the licenses to their intended use. Rather than continue to play

by the bankruptcy rules, the FCC chose the critical moment when NextWave was set to emerge from Chapter 11 to assert for the first time that, for "regulatory" reasons, it was revoking NextWave's licenses because NextWave had not made an installment payment on those licenses some fifteen months earlier. The FCC then reauctioned the licenses (at the peak of a spike in spectrum values) to the large incumbents that already dominate the wireless industry. That action derailed NextWave's reorganization, delayed deployment of the licenses to serve the public, and threatened to destroy $600 million of investment by NextWave's other creditors and equity holders.

As the D.C. Circuit correctly held, the FCC's conduct was an obvious violation of § 525. The provision makes irrelevant the government's motive in canceling a license; cancellations are prohibited whether the government is acting for regulatory or pecuniary purposes or some mixture of the two. Neither the FCC nor any other agency has the power to claim for itself a regulatory exception to the Code that overrides the statute's plain language and the policies that it embodies. Congress has taken care to grant government entities specific exemptions from the Code where warranted, and this Court has scrupulously respected those judgments by refusing to create additional exceptions at the behest of regulators who – like the FCC here – claim the Code interferes with their regulatory agendas. Section 525 should thus be enforced as written.

STATEMENT OF THE CASE

A. NextWave's Initial Efforts To Enter The Wireless Market

NextWave was formed in 1995 by experienced telecommunications executives to compete as a nationwide "carrier's carrier," providing wireless services on a wholesale basis. By early 1996, NextWave had raised more than $600 million – from institutional investors such as banks, insurance com-

panies and pension funds, and telecommunications companies – and had retained Merrill Lynch and Lehman Brothers to lead its public financing efforts. Joint Appendix ("JA") 39.

In May and July 1996, NextWave participated in the FCC's "C-Block" auction of electromagnetic spectrum licenses for personal communications services ("PCS"). Congress had previously authorized the FCC to distribute spectrum licenses by competitive bidding, 47 U.S.C. § 309(j), but was concerned that a strict auction regime would favor large companies and intensify concentration in the industry, *see id.* § 309(j)(3)(B); H.R. Rep. No. 103-111, at 255-56 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 581-82. Congress thus instructed the FCC to ensure that "small businesses" have the opportunity to obtain spectrum licenses via auction. 47 U.S.C. § 309(j)(4)(D). The FCC reserved the C-Block spectrum (and "F-Block" spectrum) for "designated entities," generally small businesses and entrepreneurs with assets and gross revenues below certain thresholds. Pet. App. 53a.

Though not required by statute to do so, the FCC "extended credit" to bidders in the C- and F-Block auctions by allowing them to pay for licenses in installments. *In re Implementation of Section 309(j) of the Communications Act Competitive Bidding*, 8 F.C.C.R. 7635, ¶ 69 (1993). The FCC noted that installment payments "would reduce the amount of private financing needed by a prospective licensee," but would also "burden . . . the government with the risk of default." *Id.* The FCC thus limited installment plans to bidders, like those in the C-Block auction, "whose economic opportunity should be ensured and [who] are likely to have difficulty obtaining adequate private financing." *Id.*

Successful C-Block bidders were required to pay five percent of their bid at the close of the auction, an additional five percent at the time of the license grant, and the remaining 90 percent in installments over ten years, with no principal due for the first six years. *See* Pet. App. 53a–54a

n.4. Moreover, under the FCC's rules, licensees such as NextWave had to construct specified portions of their networks within five years after receiving their licenses; the FCC chose not to impose any intermediate deadlines during that five-year period. 47 C.F.R. § 24.203.

NextWave was the high bidder at the C-Block auctions for 63 licenses with bids totaling $4.74 billion – an amount consistent with spectrum values implied by contemporaneous valuations of comparable publicly traded wireless companies. JA39. NextWave made the requisite $237 million down payment and filed applications for the licenses. Pet. App. 312a-313a. The FCC did not issue the licenses until January 1997, whereupon NextWave paid the remainder of its down payment, bringing its total payment to almost $500 million. As required by the FCC, NextWave signed promissory notes for the balance of its debt and executed security agreements giving the FCC liens on the licenses. *Id.* at 391a, 401a. The FCC then filed statements under the Uniform Commercial Code to perfect its liens. *Id.* at 5a.[1]

NextWave moved quickly to implement its business plan. By early 1997, NextWave had hired more than 600 employees and contractors and opened 22 offices across the country. JA39-40. NextWave had also secured more than $2 billion in financing commitments for network equipment from vendors such as Lucent, Hughes, and Nortel. JA40-41. Within a few months, NextWave had set up ninety percent of the microwave links needed to launch service, acquired seven switch sites, designed more than 1300 cell sites, and signed more than 300 site leases. JA40. NextWave expected to begin service in four markets (including Washington,

[1] In a subsequent auction of D-, E-, and F-Block licenses, NextWave was the high bidder for 32 additional licenses with bids totaling $125 million. NextWave made timely down payments on its 27 F-Block licenses, which are also at issue in this appeal. NextWave paid in full for its 5 D-Block and E-Block licenses when granted and those licenses are not at issue.

D.C.) by late 1997, and had completed engineering designs for 22 major markets. JA40. NextWave had also signed contracts to sell more than 35 billion minutes of use to resellers such as MCI. JA40-41.

NextWave and all other C-Block licensees suffered a dramatic reversal as 1997 unfolded. To begin with, the FCC "failed to complete action on all license applications" until long after the auction was over, forestalling C-Block licensees from raising funds in capital markets. H.R. Rep. No. 105-801, at 15 (1998). During that period of delay, the FCC auctioned nearly 1500 additional PCS licenses in the D, E, and F Blocks. Bids for those licenses averaged less than 25 percent of the C-Block bids.[2] Virtually overnight, the capital markets dried up, and the vast majority of C-Block licensees could not secure financing to build out their networks and make installment payments to the FCC.[3]

[2] Although the Commission had announced in August 1995 that there would be auctions of D, E, and F Blocks at some time after the C-Block auction, the subsequent auction dates were not announced until the initial C-Block auction was well underway. *See FCC Hits $20 Billion Mark in Total Auction Revenues*, 1996 WL 159208 (FCC Apr. 5, 1996); *cf.* FCC Br. 7 n.5. The PCS band was not the only spectrum market where prices declined. In the "WCS auction," *see* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996), an auction that Congress had earmarked for $1.8 *billion* garnered slightly more than $13 *million*. *See WCS Auction Ends With Bid Total of Only $13.6 Million*, Comm. Daily, Apr. 28, 1997. These depressed market conditions prevailed through mid-1999: in a PCS spectrum auction that concluded in April 1999, bids averaged less than 12 percent of the initial C-Block prices. *See generally Hearing Before the Subcomm. on Telecomm. and the Internet of the House Comm. on Energy and Commerce*, 107th Cong. at 24 (Dec. 11, 2001) ("*Commerce Hearing*") (statement of Rep. Tauzin).

[3] *See Commerce Hearing* at 24 (statement of Rep. Tauzin) ("the speed in which Congress and the FCC went out and auctioned additional spectrum . . . may have severely undercut capacity of groups like NextWave to go out and do their financing"). As the district judge who presided over NextWave's bankruptcy proceeding observed, "[a]pproximately $1.6 billion of public financing was sought by C block licensees after the

In response to this industry-wide crisis, the FCC initiated proceedings to consider possible relief. In March 1997, shortly after the second-largest C-Block licensee – Pocket Communications Inc. ("Pocket") – filed for bankruptcy, the FCC temporarily suspended the payment obligations of C- and F-Block licensees. That step "effectively signal[ed] to capital markets that the C-block was financially imperiled," further hampering licensees' ability to raise capital. H.R. Rep. No. 105-801, at 16. In October 1997 and March 1998, the FCC issued orders offering limited restructuring options to those licensees (the "*Restructuring Orders*"). *See* Pet. App. 5a-6a (describing orders). As then-Chairman Hundt observed in dissent, however, the FCC failed to "adopt a comprehensive plan for addressing the financial situation of the C-Block," leaving "a substantial risk of bankruptcies that Congress and any commercially reasonable enterprise would have us eliminate."[4]

By October 1997, the third-largest C-Block license holder – General Wireless, Inc. ("GWI") – had joined Pocket in bankruptcy.[5] NextWave did not, however, seek bankruptcy protection at that time. Between November 1997 and June 1998, NextWave's officers and shareholders lent the company millions of dollars while it continued to construct its network and seek permanent financing to meet its obligations to the FCC. JA43. Despite its efforts to remain solvent,

award of their licenses. Not one dollar of this $1.6 billion was raised in the public market." Pet. App. 270a.

[4] Separate Statement of Chairman Reed E. Hundt, *In re Amendment of the Comm'n's Rules Regarding Installment Payment Fin. for Pers. Communications Servs. (PCS) Licensees*, 12 F.C.C.R. 16436 (1997).

[5] Eventually, 92 percent of the approximately 90 C-Block licensees would declare bankruptcy, fail entirely, or return their licenses to the FCC. *See* Heather F. Weaver, *FCC Gives Guidance on Installment Payment Changes*, Crain's Radio Comm. Report, Sept. 28, 1998, at 22; *see also* Pet. App. 270a ("[T]he C Block auction was a disaster for every participant. Those who bid but did not win are lucky, not hurt") (district court decision).

NextWave was forced to curtail its operations, laying off more than 500 employees and contractors. By June 1998, NextWave owed more than $400 million to creditors (in addition to its FCC obligations) and faced attachment proceedings and other debt collection litigation.

B. Bankruptcy Proceedings

NextWave's Bankruptcy Filing. On June 8, 1998 – after spending well over half a billion dollars to meet its FCC obligations and to build its network – NextWave filed a Chapter 11 bankruptcy petition. NextWave was not in default on any of its obligations to the FCC. NextWave sought the protections of Chapter 11 for the reasons all debtors do – to preserve the value of the estate for all creditors, and to obtain breathing space to reorganize and emerge as a viable entity. Pursuant to the Bankruptcy Code's general prohibition against payment of prepetition debts while in bankruptcy, *see, e.g., Official Comm. of Equity Sec. Holders v. Mabey*, 832 F.2d 299, 302 (4th Cir. 1987), NextWave suspended payments to all creditors, including the FCC, until confirmation of a plan of reorganization.

Initially, NextWave's bankruptcy proceeded routinely. Creditors, including the FCC, filed their proofs of claim. The FCC asserted secured claims of more than $4.7 billion. JA34. In a July 1998 bankruptcy court filing, the FCC acknowledged that the Code's protections suspended otherwise applicable regulatory deadlines. C.A. App. 737 (citing 11 U.S.C. § 108(b)(2)).[6] That same filing confirmed that the Code's automatic stay (11 U.S.C. § 362) would give NextWave "'bankruptcy protection from collection of C block license payments pending reorganization of its business affairs.'" Pet. App. 181a (citation omitted). The FCC's statements in court thus recognized that NextWave could

[6] "C.A. App." refers to the Joint Appendix filed in the D.C. Circuit. Copies of the C.A. App. have been lodged with the Court.

retain its licenses, even though it was not making installment payments while it reorganized.[7]

Section 544 Proceedings. As a debtor-in-possession, NextWave had a fiduciary duty to *all* of its creditors and was obligated to limit its payments to each creditor to the amount required by law. *CFTC v. Weintraub*, 471 U.S. 343, 355 (1985); *Nathanson v. NLRB*, 344 U.S. 25, 28-29 (1952). Before NextWave had filed for bankruptcy, the court in GWI's bankruptcy case had significantly reduced GWI's obligations to the FCC in an avoidance action under the Code. *See In re GWI PCS 1, Inc.*, 230 F.3d 788, 794 (5th Cir. 2000), *cert. denied*, 533 U.S. 964 (2001). NextWave was therefore required to seek similar relief on behalf of its other creditors, which it did under § 544 of the Code. Pet. App. 137a. The bankruptcy court granted relief, *id.* at 138a-141a, and the district court affirmed, *id.* at 254a-272a.

The Second Circuit reversed. *Id.* at 213a-253a. That ruling did not hold, as the FCC implies, that the Bankruptcy Code imposes no substantive limits on the FCC's regulatory authority. *See* FCC Br. 9. As the Second Circuit explained, "[t]he FCC argued that the bankruptcy court lacked *subject matter jurisdiction* over NextWave's claim because exclusive jurisdiction to review FCC regulatory actions is lodged in the courts of appeals." Pet. App. 105a (emphasis added). The Second Circuit agreed that the status of NextWave's license conditions implicated the FCC's regulatory authority. It therefore held that "because jurisdiction over claims

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[7] Consistent with these statements, prior to October 1998 the Commission sent repeated notices to non-bankrupt C-Block licensees reminding those licensees of their payment obligations and specifying their payment amounts, but no such notices were sent to any licensees in bankruptcy, including NextWave. C.A. App. 925, ¶¶ 5-6. The FCC's actions were also consistent with its position in other C-Block bankruptcy cases. *See* H.R. Rep. No. 105-801, at 16 (FCC "intervened in the bankruptcy proceedings for Pocket Communications, and offered to reduce Pocket's debt obligations by approximately 60 percent").

brought against the FCC in its regulatory capacity lies exclusively in the federal court of appeals, *see* 28 U.S.C. § 2342; 47 U.S.C. § 402," the bankruptcy court lacked jurisdiction "to decide the question whether NextWave had satisfied the regulatory conditions placed by the FCC upon its retention of the licenses." *Id.* at 233a. The Second Circuit then addressed the merits of NextWave's avoidance claim insofar as it concerned financial obligations rather than license disposition. *Id.* at 237a-252a. The court held that a bidder's financial obligations become binding at the close of the auction, foreclosing any avoidance action to reduce the FCC's claim. *Id.* at 240a-247a.

NextWave's Rapid Reorganization. Aided by improving market conditions, NextWave proposed a plan of reorganization in December 1999 that committed the company to meeting all future FCC obligations and paying all creditors, including the FCC, all past-due amounts, penalties, and interest, thus curing all alleged defaults. On January 11, 2000, NextWave also offered the FCC "a single lump sum payment to satisfy its entire $4.3 billion outstanding obligation to the [FCC]," *id.* at 12a, providing full payment for the licenses seven years earlier than required by the original installment notes. Thus, within 18 months of seeking the breathing space provided by the Code, NextWave was poised to emerge from bankruptcy with a plan of reorganization that would have allowed it to build its network and begin service to the public well in advance of the deadlines imposed by FCC rules, thereby vindicating the policies of Chapter 11 *and* the FCC's asserted regulatory interests.

The FCC's Effort to Revoke NextWave's Licenses. Despite having acknowledged repeatedly that NextWave would enjoy the protections of the Bankruptcy Code while reorganizing, on January 12, 2000 – a mere eight days before NextWave's proposed reorganization plan was scheduled to be confirmed – the FCC rejected NextWave's payment offer and blocked confirmation of NextWave's plan. The FCC

contended for the first time ever that NextWave's C- and F-Block licenses had "automatically" canceled more than a year earlier when NextWave did not make installment payments during its bankruptcy. JA52-53. The FCC also announced that NextWave's licenses were "available for auction under the automatic cancellation provisions" of the FCC's rules. Pet. App. 96a-97a. Thus, having taken full advantage of the bankruptcy process as a secured creditor for 18 months while spectrum prices were low, the FCC tried to opt out of the process when market conditions improved.

NextWave sought emergency relief in the bankruptcy court. The court described the FCC's sudden effort to cancel NextWave's licenses as "shocking," *id.* at 135a, and contrary to "countless written and oral utterances and acts of the FCC" throughout the bankruptcy proceedings. *Id.* The court noted, for example, that the FCC had made no effort to cancel the licenses when NextWave did not tender a payment in October 1998. To the contrary, in November 1998, the FCC had acknowledged to the district court that "'[d]uring the pendency of the bankruptcy, the Bankruptcy Court and the automatic stay would hold the creditors at bay, *including the Federal Communications Commission*.'" *Id.* at 182a & n.15 (emphasis added). In a hearing days later, the FCC had confirmed to the bankruptcy court that although "'[t]he regulations provide that upon failure to make the payments the license is automatically canceled[,] . . . *[t]hat hasn't [happened] in this case due to the automatic stay*.'" *Id.* at 182a & n.16. Similarly, in a May 1999 hearing, FCC counsel had emphasized that "'there is no trigger for the automatic cancellation that I understand to date with regard to the F-block licenses,'" which were subject to the same payment conditions as the C-Block licenses. *Id.* at 182a-183a & n.17. Finally, in August 1999, the FCC had negotiated and pledged to support an alternative plan of reorganization to be filed by Nextel, a competitor of NextWave, that provided that the "'licenses . . . issued by the FCC to the NextWave

Debtors . . . would be transferred directly to Nextel'" – a transfer that would not have been possible had the licenses canceled "*automatically*" in October 1998 – and that would have discharged NextWave's debts to the FCC and other creditors by distributing the proceeds of the Nextel payment upon confirmation of the plan. *Id.* at 183a. *See generally id.* at 181a-185a (cataloguing FCC statements throughout bankruptcy proceedings).

After reviewing that history, the bankruptcy court held that the license revocation was irreconcilable with the FCC's prior representations and void under numerous provisions of the Bankruptcy Code, including the automatic stay (11 U.S.C. § 362(a)) and the right to cure (11 U.S.C. §§ 1123(a)(5)(G) and 1124(2)(A)). *Id.* at 134a-212a.

C. The Second Circuit's Mandamus Decision

The FCC sought emergency relief from the Second Circuit, which issued a writ of mandamus on May 25, 2000 vacating the bankruptcy court's order. *Id.* at 102a-133a. The Second Circuit explained, as it had in the earlier appeal, that "the FCC's licensing decisions are subject to the exclusive jurisdiction of the federal courts of appeals." *Id.* at 103a.

The Second Circuit emphasized, however, that NextWave would be "free to pursue its challenge to the FCC's regulatory acts" before the D.C. Circuit. *Id.* at 131a. The court repeatedly declined to rule on the validity of the license cancellation, stating "we have no occasion to express an opinion" whether "the bankruptcy court is right on the merits of its arguments against revocation." *Id.* at 127a; *see also id.* at 103a ("[w]e make no comment on the prospects of the (precautionary) appeals filed by NextWave in . . . the District of Columbia Circuit"); *id.* at 126a n.8 ("we have no occasion to opine on whether the Public Notice [announcing the license cancellation] is valid or whether the Licenses automatically canceled at some prior date").

D. Judicial Review Of The Attempted Cancellation

NextWave had previously filed with the FCC a petition for reconsideration of the license cancellation, shortly after the cancellation had been announced. The FCC denied the petition on September 6, 2000, relying on the Second Circuit's mandamus decision. *Id.* at 83a.

NextWave appealed to the D.C. Circuit pursuant to 47 U.S.C. § 402, asserting that the cancellation was arbitrary and capricious and contrary to law in violation of the Administrative Procedure Act ("APA") and the Bankruptcy Code. Despite NextWave's appeal, and despite NextWave's warnings that a reauction in advance of the D.C. Circuit's decision could cause chaos, the FCC pushed ahead with plans to reauction NextWave's licenses. The FCC warned bidders, however, that the reauction was subject to the NextWave litigation.

The reauction occurred in January 2001, at the peak of a rise in spectrum prices. Moreover, the FCC changed the auction rules to allow telecommunications giants to bid on the licenses (including NextWave's) previously reserved for designated entities. The FCC removed all designated entity restrictions for most of the spectrum, and adopted "more flexible" qualification standards for designated entities entitled to bid on the remaining spectrum.[8]

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[8] *In re Amendment of the Comm'n's Rules Regarding Installment Payment Fin. for Pers. Comms. Serv. (PCS) Licensees*, 15 F.C.C.R. 16266, ¶¶ 16-24 (2000); *In re Amendment of Part 1 of the Comm'n's Rules – Competitive Bidding Procedures*, 15 F.C.C.R. 21520, ¶ 59 (2000). These changes drew vigorous protests from Members of Congress. *See, e.g.*, Letter from Sen. Trent Lott to William E. Kennard, Feb. 22, 2000 (objecting to requests from "some of the largest wireless players . . . to tear away entirely meaningful protections for small businesses" in C-Block reauction); Letter from Rep. Tom Bliley and Rep. John Dingell to William E. Kennard (Sept. 26, 2000) (FCC's "legal theory that these small business licenses have automatically cancelled and the agency's subsequent decision that they should be re-

The major wireless incumbents dominated the reauction. Verizon Wireless alone garnered $8.5 billion worth of licenses. Petitioner VoiceStream was the high bidder for hundreds of millions of dollars' worth of licenses, both in its own right and indirectly through a designated entity in which it is the majority investor. Arctic Slope Br. 15-16. Alaska Native Wireless (in which AT&T Wireless holds an 80 percent equity interest and in which petitioner Arctic Slope has a "substantial interest," *id.* at 15 & n.3) was high bidder for $2.7 billion worth of licenses. *See Applications of Alaska Native Wireless, LLC*, 2002 WL 334189 (WTB Mar. 4, 2002). All told, the nation's five largest wireless carriers were (directly or indirectly) the high bidders on 85 percent of the reauctioned spectrum. *See* Peter S. Goodman, *Auction Fails to Open Airwaves; Small Firms Backed By Cellular Titans Buy Up Spectrum*, Wash. Post, Jan. 23, 2001, at A1.

The licenses were never transferred, however, because shortly after the reauction, the D.C. Circuit reversed the cancellation of NextWave's licenses. Pet. App. 1a-51a. The court rejected the FCC's contention that the Second Circuit decisions were *res judicata* on the merits. The D.C. Circuit held that the Second Circuit had held only that the FCC's "license cancellation" was "reviewable only by a court of appeals . . . and thus that the bankruptcy court lacked jurisdiction to apply the Code to these acts." *Id.* at 24a.

The D.C. Circuit then held that the cancellation violated § 525 because a license cancellation triggered solely by a debtor's failure to make a payment while in bankruptcy falls squarely within the unambiguous terms of § 525. *Id.* at 2a. The court rejected each of the FCC's efforts to evade § 525, recognizing them as improper attempts to import a regulatory-purpose exception into the provision. *Id.* at 30a-32a, 41a-43a. The court concluded that, by looking at "no other

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auctioned to small and large providers alike" is "impossible to square" with § 309(j)'s directive to avoid "excessive concentration of licenses").

factor [than non-payment] in determining whether NextWave should retain its licenses," *id.* at 45a, the FCC violated § 525's prohibition of an "automatic reaction" against a debtor who "avail[s] himself of the protection of the bankruptcy laws," *id.* at 46a (quoting H.R. Rep. No. 95-595, at 165 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6126).

The D.C. Circuit also rejected the argument that application of § 525 would frustrate the Communications Act. The court noted that "nothing in the Act required the Commission to choose the licensing scheme at issue here," *id.* at 50a, and thus that "[t]he Commission, having chosen to create standard debt obligations as part of its licensing scheme, is bound by the usual rules governing the treatment of such obligations in bankruptcy." *Id.* at 2a.[9]

E. NextWave's Second Plan Of Reorganization

After the D.C. Circuit's decision, NextWave resumed its efforts to emerge from bankruptcy. On August 6, 2001, NextWave filed a second proposed plan of reorganization, again providing for full payment to the FCC and all other creditors. NextWave also secured financing commitments of approximately $5 billion and entered into a $100 million hardware contract with Lucent Technologies to continue deploying its advanced wireless network. *See* Yochi J. Dreazen & Pui-Wing Tam, *Qualcomm to Invest in NextWave, Center of Wireless-Market Dispute*, Wall St. J., Aug. 17, 2001, at B3. NextWave has made rapid progress on the construction of its network and has now deployed wireless facilities in all of its C-Block markets.

In the meantime, spectrum prices have remained volatile: the value of NextWave's licenses is perceived by analysts to have fallen by as much as 50-70 percent below the reauction

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[9] Given its resolution of NextWave's claims under § 525, the D.C. Circuit did not address NextWave's alternative grounds for relief, including the right to cure under §§ 1123 and 1124 of the Code, as well as principles of due process, fair notice, and estoppel. *Id.* at 51a.

bids. *See, e.g.*, TR Daily (May 7, 2002). Indeed, some "winners" of the reauction have contended that they cannot be compelled to pay the amount they bid, notwithstanding the FCC's position that the reauction still binds the high bidders should the FCC ultimately prevail in this case. Respondent Verizon Wireless has filed litigation to rescind the reauction results, and Petitioner VoiceStream has intervened. Notwithstanding the continued volatility in spectrum value, NextWave is committed to paying its full bid, emerging from bankruptcy, and competing in the wireless market.

SUMMARY OF ARGUMENT

Section 525 of the Bankruptcy Code provides that a governmental entity may not "revoke . . . a license . . . to . . . a person that is . . . a debtor under this title . . . solely because such . . . debtor . . . has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. § 525(a). The FCC violated the clear command of that provision when it revoked NextWave's spectrum licenses.

The plain language of the Bankruptcy Code leaves no doubt that the FCC's conduct violated § 525. NextWave's payment obligations to the FCC are clearly "debts." Under the Code, a debt is a liability on a claim, and a claim is any right to payment. "The plain meaning of a 'right to payment' is nothing more than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation." *Pennsylvania Dep't of Welfare v. Davenport*, 495 U.S. 552, 559 (1990). It is equally clear that NextWave's debts are dischargeable. In Chapter 11 cases, by operation of law, a plan of reorganization discharges "any debt that arose before the date of such confirmation." 11 U.S.C. § 1141(d)(1)(A). And the FCC canceled NextWave's licenses "solely because" NextWave did not pay its debts to the FCC while reorganizing: the sole trigger for cancellation was nonpayment.

Section 525 is a critically important feature of the Bankruptcy Code. It reflects Congress's judgment that a debtor's licenses are often indispensable to its ability to reorganize. Preserving the debtor's ability to retain its licenses therefore advances the Code's goals of rehabilitating debtors, preventing dismemberment of the debtor's assets and maximizing the value of the estate for creditors, and ensuring that all creditors are treated fairly. NextWave's experience underscores § 525's importance. The FCC's refusal to comply with § 525 not only threatened to defeat the claims of all other creditors, but also derailed a reorganization that would have paid the FCC and NextWave's other creditors in full, allowing NextWave to emerge as a viable competitor within eighteen months of entering Chapter 11.

The FCC's only answer to the plain text of § 525 is to spend page after page restating, in many guises, the single point that § 525 should not apply because NextWave's licenses were revoked for regulatory rather than pecuniary reasons. But § 525 contains no regulatory exception for the FCC, express or implied, and creating one would be fundamentally at odds with § 525 and the Code generally. Congress has taken great care to specify when a particular regulatory interest is important enough to override the Code's protections for debtors and other creditors. Section 525 itself contains an express exception for the Secretary of Agriculture's regulatory actions under three particular enactments, making clear both that § 525 otherwise applies to "regulatory" license revocations and that Congress did not intend an exemption for the FCC.

Nor can the FCC's desired "regulatory exception" be justified as necessary to accommodate a purported conflict with provisions of the Communications Act. There simply is no conflict. When Congress directed the FCC to "consider" using "guaranteed installment payments" or other methods to assist small businesses in bidding for spectrum licenses, 47 U.S.C. § 309(j)(4)(A), it did not mandate any particular

method of financing, nor did it grant the FCC any exemption from the normal operation of the Bankruptcy Code, despite the obvious risk of bankruptcy created by installment loans. And Congress has repeatedly rebuffed efforts by the FCC to obtain a legislative exemption from the Code for its auction-related activities. The FCC lacks the authority to override those judgments in the name of "auction integrity" or any other policy goal. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

The FCC's contention that applying § 525 as written will create incentives for insincere bidding ignores commercial reality and fundamental principles of bankruptcy law. Even apart from the grave business consequences that attend filing for bankruptcy, FCC licensees would have nothing to gain (and much more to lose) from submitting reckless bids with the intent of declaring bankruptcy if the bids cannot be financed. The Code prevents windfalls to licensees: if the debtor's plan of reorganization does not provide for payment of the full amount of the FCC's claim, *the licensee's equity holders risk losing their stake in the company*.

NextWave followed the law when it sought the protections of Chapter 11 and proposed a plan for successful reorganization, and the FCC violated the law when it ignored those protections. The Court of Appeals correctly rejected the FCC's attempt to exempt itself from the same bankruptcy rules that apply to all other creditors. Those rules protect the FCC's financial claims, and do not impair its ability to implement the Communications Act. This Court should affirm the D.C. Circuit's application of § 525 as written, lest other governmental units also seek to exempt themselves from the Code's clear terms, thus undermining the purposes and policies the Code promotes and upholds.

ARGUMENT

I. THE FCC VIOLATED SECTION 525.

Section 525 provides in plain terms that "a governmental unit may not deny, revoke, suspend or refuse to renew a license, permit, charter, franchise or other similar grant to . . . a person that is . . . a debtor under this title . . . solely because such . . . debtor . . . has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. § 525(a).

Section 525 undoubtedly applies here. It is undisputed that the FCC is a "governmental unit" that "revoked" a "license" to a "person that is a debtor under this title."[10] The FCC's own statements unambiguously demonstrate that its sole basis for canceling the licenses was NextWave's failure to make installment payments in October 1998. FCC Br. 9-10. Those payment obligations are clearly "debts." 11 U.S.C. § 101(12) ("debt" is "liability on a claim"); *id.* § 101(5)(A) ("claim" is "right to payment"). Like any other pre-confirmation debt, NextWave's payment obligations are dischargeable in NextWave's case under Title 11 by confirmation of a plan of reorganization. *Id.* § 1141(d)(1)(A).[11]

Because the "statutory language is clear," *Rake v. Wade*, 508 U.S. 464, 471 (1993), the D.C. Circuit correctly "enforce[d] it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *accord Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). The FCC nevertheless maintains that § 525 is an

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[10] Under the Code, "person" includes a "corporation" as well as an individual. 11 U.S.C. § 101(41); *see Toibb v. Radloff*, 501 U.S. 157 (1991).

[11] Section 525 precludes cancellation whether or not the licenses fall within the Code's broad definition of "property of the estate." 11 U.S.C. § 541(a). Nevertheless, NextWave's interest in the licenses – the exclusive right to use particular spectrum for a defined period – constitutes "property of the estate." *E.g., In re Central Ark. Broad. Co.*, 68 F.3d 213, 214-15 (8th Cir. 1995); *see also United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-05 (1983) (noting Code's broad definition of "property of the estate").

"ambiguous statute" that ought to be given an "accommodative meaning" to allow the FCC to revoke licenses as it sees fit. FCC Br. 21. Specifically, the FCC contends that (i) NextWave's payment obligations to the FCC are not "dischargeable debts," but "regulatory conditions"; (ii) the licenses were not revoked "solely because" NextWave missed payments, but for "regulatory purposes"; (iii) § 525 should be limited to actions that specifically discriminate against debtors; and (iv) the Second Circuit's rulings in NextWave's bankruptcy case establish that the debts are not dischargeable "in the case under this title." *Id.*

The FCC's arguments merely seek in four different ways a judicially created "regulatory" exception to § 525. The FCC's arguments, however, are contrary to any "natural reading" of § 525's terms, the relevant "terminology used throughout the Code," and the Code's structure and purposes. *Ron Pair Enters.*, 489 U.S. at 241, 242 n.5. Moreover, the FCC's reading of the Bankruptcy Code is entitled to no deference. *See Bildisco*, 465 U.S. at 529 n.9; *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). Thus, even if the FCC's policy preferences had merit – and they do not (*see* pp. 41-50 *infra*) – they must be addressed to Congress. "[U]nless and until Congress makes such a decision," this Court "must follow the current direction [§ 525] provides." *Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998).[12]

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[12] Legislation has repeatedly been introduced in Congress to exempt the FCC's licensing decisions from "Title 11, United States Code, or any otherwise applicable Federal or state law regarding insolvencies or receiverships," *see, e.g.*, H.R. 4690 § 618, 106th Cong. (2000); H.R. 2670 § 618, 105th Cong. (1999), but that legislation has never been enacted. Congress's repeated consideration and rejection of an exemption for the FCC's licensing decisions confirms that the FCC's efforts to obtain the same relief from this Court must fail. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147-50 (2000).

A. NextWave's Payment Obligations To The FCC Are Dischargeable Debts.

1. ***The obligations are "debts."*** NextWave's obligations to make installment payments to the FCC are plainly "debts" under the Bankruptcy Code. The term "debt" is an expressly defined term used throughout the Code and cannot be redefined *ad hoc* just for this case. "Debt" means "liability on a claim." 11 U.S.C. § 101(12). "Claim," in turn, has "the broadest available definition," *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991), and includes any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A). A "right to payment" means "nothing more or less than an enforceable obligation." *Johnson*, 501 U.S. at 83 (quotation and citation omitted).

NextWave's payment obligations to the FCC unquestionably fall within the definition of "debt." Their source is an "Installment Payment Plan Note," which creates an enforceable obligation on NextWave's part to make installment payments to the FCC. Pet. App. 391a-393a. NextWave also executed a security agreement defining NextWave as a "Debtor" under the Note, *id.* at 401a, and the FCC recorded the liens by filing UCC statements, *id.* at 5a. The licenses themselves similarly require NextWave to comply with "the terms of the Commission's installment plan as set forth in the Note and Security Agreement." *Id.* at 388a. Although the licenses are conditioned upon "payment of all monies due pursuant to Sections 1.2110 and 24.711 of the Commission's Rules," *id.*, those rules merely restate the requirement of "performance of the licensee's *payment obligations under the installment plan*" – *i.e.*, the Note. 47 C.F.R. § 1.2110(g)(4) (emphasis added). Finally, in NextWave's bankruptcy case, the FCC asserted a "secured claim" of $4.7 billion dollars. JA 34. Because the FCC holds a "claim," NextWave owes a "debt."

2. ***The debts are "dischargeable."*** NextWave's debts to the FCC are also plainly "dischargeable." An obligation's status as a pre-confirmation "debt" conclusively establishes its dischargeability, unless it falls within an express exception to discharge. *See Ohio v. Kovacs*, 469 U.S. 274, 278 (1985). Section 1141 is absolutely clear: it provides that "the confirmation of a plan [of reorganization] . . . discharges the debtor from *any debt* that arose *before the date of such confirmation*," except where express statutory exceptions to discharge apply. 11 U.S.C. § 1141(d)(1)(A) (emphasis added).

No statutory exception to discharge applies here. The Code expressly excepts certain debts of individual debtors from discharge, *id.* §§ 523, 1141(d)(2), and excepts debts of *liquidating* corporations, *id.* § 1141(d)(3), but there are *no* exceptions for reorganizing corporate debtors like NextWave. The Code's unambiguous text leaves no room for the implied regulatory exception the FCC seeks. Congress's use of "the word 'any'" in § 1141(d) to define the scope of discharge "undercuts the attempt to impose [a] narrowing construction." *Salinas v. United States*, 522 U.S. 52, 57 (1997). And the existence of specific exceptions from discharge for particular regulatory purposes, *see* 11 U.S.C. § 523(a)(1), (a)(8), (a)(12), (a)(13), refutes any argument for a general regulatory exception. *See TRW, Inc. v. Andrews*, 122 S. Ct. 441, 447 (2001).

3. **Davenport *and* Kovacs *foreclose the FCC's contrary argument.*** Notwithstanding the Code's definition of "debt" and the scope of the discharge under Chapter 11, the FCC baldly asserts that NextWave's obligations are not dischargeable debts because "the payment obligations in the FCC licenses are regulatory conditions." FCC Br. 30. In addition to conflicting with the plain statutory language, that argument is squarely foreclosed by this Court's decisions in *Davenport* and *Kovacs* – which Petitioners ignore.

The issue in *Davenport* was whether "restitution obligations imposed as conditions of probation in state criminal

actions" are dischargeable debts. 495 U.S. at 555. Like the FCC here, the State in *Davenport* contended that the "restitution order is not a 'right to payment' [and therefore not a debt] because neither the Probation department nor the victim stands in a traditional creditor-debtor relationship." *Id.* at 558. The State also argued that criminal restitution obligations are not "debts" or "claims" because their *purpose* is rehabilitation and punishment rather than compensation. *Id.* The Court flatly rejected those arguments:

> [T]he language employed to define "claim" in [the Code] makes no reference to purpose. The plain meaning of a "right to payment" is nothing more nor less than an enforceable obligation, *regardless of the objectives the State seeks to serve in imposing the obligation.*

Id. at 559 (emphasis added).

The Court in *Davenport* also rejected the state's plea for a policy exception to dischargeability, noting that "Congress defined 'debt' broadly and took care to except particular debts from discharge where policy considerations so warranted." *Id.* at 562. Congress created a statutory exception for criminal restitution orders in Chapter 7 but not Chapter 13. *Id.* at 563. That "statutory language plainly reveal[ed] Congress's intent not to except restitution orders from discharge in certain Chapter 13 proceedings." *Id.*

Similarly, in *Kovacs* the Court held that an affirmative clean-up injunction under a state's environmental laws was a dischargeable debt. 469 U.S. at 278. The State contended that the obligation was not a "debt" because it arose from breach of a regulatory statute. The Court rejected that contention as contrary to the Code's "broad definition of a 'claim.'" *Id.* at 279. The obligation was a "debt" because "the only performance sought from Kovacs was the payment of money." *Id.* at 283. Because the debt was not covered by any express exception to discharge, it "was dischargeable in bankruptcy." *Id.*

Davenport and *Kovacs* establish a clear test: if payment of money would satisfy an obligation, then the obligation is a "debt," and all debts are dischargeable unless expressly exempted from discharge by Congress. There is thus no merit to the FCC's argument that the payment obligations are not "debts" because non-payment might result in revocation of licenses without civil debt collection proceedings. FCC Br. 33. The Court rejected the identical argument in *Davenport*: a criminal restitution obligation is a debt, even if non-payment results in revocation of probation rather than civil debt collection. 495 U.S. at 559. Indeed, the threat of license revocation – like revocation of probation – is an extremely powerful weapon in the debt collector's arsenal. *See id.* Neither the "purpose" nor the "enforcement mechanism" of payment obligations places them outside the Code's definition of "claim" or "debt." *Id.* at 560.

The FCC also suggests that this case is special because NextWave's obligation is both a regulatory condition and a debt. But the critical holding in *Davenport* and *Kovacs* is that a regulatory condition that can be satisfied by the payment of money *is* a debt, and thus the FCC's effort to assign significance to the dual classification is unavailing. Indeed, in *Davenport* and *Kovacs*, the Court recognized the payment obligations as dischargeable debts when they lacked *any* contractual foundation and arose solely from regulatory requirements. This case is even easier because the source of NextWave's obligation is the Note, and the licenses and applicable regulations do no more than require payment of that Note. If the payment obligations in *Davenport* and *Kovacs* were dischargeable debts, then *a fortiori* NextWave's payment obligations are dischargeable debts. The FCC's approach would allow government creditors to treat obligations as either debts or regulatory conditions as the value of their collateral fluctuates, taking advantage of creditor protections under the Code when the value is low, and seizing the collateral when the value is high.

Davenport and *Kovacs* recognize that distorting the meaning of "debt" and "claim" in order to create a regulatory exemption, as the FCC requests, would wreak havoc with the reorganization process. Government creditors will have no difficulty positing a regulatory purpose for every payment obligation owed to them. Chapter 11 cannot function, however, if governmental creditors are able at their whim to seize critical assets or enforce debt obligations. *See United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209 (1983). Indeed, the FCC's position would *harm* the government in other cases, because the government must have a "claim" to receive a distribution when a corporate debtor liquidates. *See Kovacs*, 469 U.S. at 286 (O'Connor, J., concurring). The FCC's *ad hoc* redefinition of "debt" cannot prevail here, as it would inappropriately "override the balance Congress struck." *Davenport*, 495 U.S. at 563.

B. The FCC Canceled The Licenses "Solely Because" NextWave Did Not Pay Its Debts To The FCC.

The FCC revoked NextWave's licenses "solely because" NextWave did not pay its license installment obligations while reorganizing. It is undisputed that nonpayment was the sole trigger for revocation of NextWave's licenses. The FCC order on review in this case states that "the C and F block licenses granted to NextWave *cancelled automatically* on October 30, 1998 *because NextWave failed to make its payment* by the redemption deadline of October 29, 1998." Pet. App. 58a-59a (emphases added); *see also id.* at 73a; FCC Br. 9-10. As the D.C. Circuit aptly observed, "[t]he Commission never denies that if NextWave had made its payments, the company could have retained its licenses." Pet. App. 38a.[13]

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[13] The nonpayment that triggered the FCC's revocation of NextWave's licenses was required by the Bankruptcy Code. Reorganizing debtors may not make interim payments on pre-petition debts while reorganizing. The limited exceptions to that rule have no application here. The FCC did not request "adequate protection" for its collateral, and thus was not entitled to payments. *See In re Shannon*, 234 B.R. 676, 685 (B.A.P. 6th Cir. 1999). Similarly, the FCC did not request, and would not have been entitled to, payment under the "necessity of payment doctrine." *See B&W Enters., Inc. v. Goodman Oil Co.*, 713 F.2d 534 (9th Cir. 1983). Indeed, far from requesting interim payments, the FCC assured the bankruptcy court and NextWave that no payments were necessary to prevent cancellation while NextWave was in bankruptcy. *Supra* pp. 7-8, 10-11.

Seeking yet another way to import a regulatory exception into § 525, Petitioners contend that the statute should apply only when a governmental entity "is motivated solely . . . by fiscal concerns or hostility to the bankruptcy laws." FCC Br. 37. The "solely because" language in § 525, they contend, is "properly read as referring to the agency's purpose or motive." *Id.* at 39. But the text unambiguously forbids a governmental entity from revoking a license when the sole cause for doing so is one of three specified triggers: (i) the licensee's status as "a debtor under this title"; (ii) the licensee's insolvency before or during bankruptcy; or (iii) the licensee's non-payment of "a debt that is dischargeable in the case under this title." 11 U.S.C. § 525(a). That text says nothing about the underlying purpose or motive for choosing that trigger.[14]

Section 525's applicability is confirmed by the express regulatory exceptions that permit the Secretary of Agriculture to revoke licenses for dealers in perishable foodstuffs in the event of insolvency, bankruptcy, or nonpayment of debts, with the goal of preserving the integrity of regulated markets.[15] *Id.* Those exceptions would be superfluous if

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[14] For that reason, Arctic Slope's discussion of "but for cause" is beside the point. Arctic Slope Br. 25. Petitioners have suggested no other trigger for the cancellation, and there is none. Arctic Slope confuses a decisionmaker's motives for selecting an exclusive criterion for the criterion itself.

[15] *See, e.g.*, 7 U.S.C. §§ 204, 228b, 499d(a), 499g(d); 7 C.F.R. § 46.9(b); *see also* H.R. Rep. No. 84-1196 at 2, 4 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3701, 3703-04; *Consumers Prod. Co., Inc. v. Volante Wholesale Prod., Inc.*, 16 F.3d 1374, 1377-78 (3d Cir. 1994) (regulatory scheme "promote[s] fair

§ 525 were inapplicable to license revocations with a regulatory purpose. *TRW*, 122 S. Ct. at 447; *Hartford Underwriters*, 530 U.S. at 6-7.

The FCC's reading of § 525 would empty it of meaning. The government can always articulate *some* regulatory motive for automatic cancellation upon the occurrence of nonpayment or another of the prohibited triggers. On its face, the relevant prohibition of § 525 applies *only* to government actions – licensing decisions – that involve the exercise of regulatory power. Indeed, if § 525 applied only when the government is pursuing its pecuniary interests, then § 525 would not preclude revocations based on failure to pay debts to private parties (where the government has no pecuniary interest at all), even though Congress plainly expected § 525 to apply in those circumstances. *See infra* p. 27.

Nor is there merit to the FCC's suggestion that the "solely because" element of § 525 can be evaded merely by writing a "regulatory license condition" into the license itself. *See* FCC Br. 40. This is just another version of the FCC's contention – refuted by *Davenport* and *Kovacs* – that the payment obligation is not a "debt" simply because it is a regulatory condition. If inserting the ground for cancellation into the license itself were enough to circumvent § 525, agencies could opt out of the statute at will – as the FCC has sought to do here by conditioning NextWave's license on payment of its Note obligations. For example, under the FCC's position, licenses could contain conditions providing for automatic cancellation triggered by filing for bankruptcy. Yet even the FCC effectively acknowledges that § 525 prohibits license cancellations triggered by bankruptcy filings, whether or not the agency has a regulatory purpose. FCC Br. 37.

Section 525's legislative history also refutes the FCC's argument. The House Report stresses that § 525 bars license

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trading practices in the marketing of perishable agricultural commodities").

cancellation as an "automatic reaction," even "where the causes of a bankruptcy are intimately connected with a license." H.R. Rep. No. 95-595, at 165 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6126. In such instances, agencies may "pursue appropriate regulatory policies," but only through "an examination into the circumstances surrounding the bankruptcy," not by "automatic reaction." *Id.* The FCC's "automatic cancellation" rule is the very "automatic reaction" § 525 forbids.[16]

Finally, the FCC's position is inconsistent with *Perez v. Campbell*, 402 U.S. 637 (1971), from which § 525 derives. In *Perez*, the Court struck down an Arizona statute that suspended the license of any driver who failed to pay an outstanding tort judgment arising from a car accident, regardless of whether bankruptcy law relieved the driver of the obligation to pay. As Petitioners concede, FCC Br. 30, in enacting § 525 Congress intended to incorporate the result in *Perez*. Accordingly, while *Perez* cannot "define the outer limits of the statute's coverage," *New York v. FERC*, 122 S. Ct. 1012, 1025 (2002), § 525 must be construed to cover *Perez*. *See* 123 Cong. Rec. 216, 219 (daily ed. Jan. 4, 1977) (statement of Rep. Edwards) (§ 525 codifies and expands *Perez*).

Perez overruled two prior decisions, *Kesler v. Department of Public Safety*, 369 U.S. 153 (1962), and *Reitz v. Mealey*, 314 U.S. 33 (1941), which had held that statutes similar to that at issue in *Perez* did not conflict with the bankruptcy laws be-

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[16] The FCC seeks to create the impression that its cancellation of the licenses reflects some broader analysis of the circumstances surrounding NextWave's bankruptcy. That is not so. No inquiry was made into NextWave's fitness to hold the licenses when the FCC acted to cancel the licenses; non-payment was the *only* trigger. *See* Pet. App. 47a (FCC made no effort to consider any "extrinsic evidence of fitness to hold a license"). Nor was any such analysis undertaken in the *Restructuring Orders*. *See* FCC Br. 39-40. Indeed, those orders merely set forth formally the FCC's motives and purpose for selecting nonpayment as the sole trigger for automatic cancellation.

cause they had the regulatory purpose of promoting highway safety. *Perez*, 402 U.S. at 650-52. *Perez* rejected the notion that a government agency could justify the denial or cancellation of a license by asserting that some government "interest or policy" underlies use of a prohibited trigger, because that would nullify the prohibition. *Id.* at 651-52. The FCC's argument that § 525 permits "regulatory" license cancellations thus imputes to Congress an intent not to codify *Perez*, but to resurrect *Kesler* and *Reitz*.

C. Section 525 Is Not Limited To Discrimination Of The Kind The FCC Posits.

Petitioners next contend that § 525 should be read narrowly to bar only "discrimination" between bankruptcy debtors who do not pay dischargeable debts and non-bankrupts who simply fail to pay their debts. FCC Br. 40-42. But the plain language of § 525 makes clear that it is not limited to "discrimination." To "discriminate" is but one of nine separate and independently operative prohibitions listed in § 525(a). Section 525's prohibition against "revok[ing]" a license is distinct from its prohibition of discriminatory treatment. The FCC's interpretation would impermissibly read out of the statute the prohibition against license revocation, as well as most of the remainder of § 525. *See, e.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 35-36 (1992); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).[17]

Unable to rely on the statute's text, the FCC again asserts that its narrow reading of § 525 is compelled by *Perez*, which the FCC claims "involved a state law that discriminated against persons who had previously sought bankruptcy protection." FCC Br. 30. But the opposite is true. *Perez* in-

[17] Petitioners point to § 525's title, but it does no more than "indicate the provision[] in a most general manner" and "cannot limit the plain meaning of the text." *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947); *accord Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 483 (2001).

validated a regulatory requirement that applied to everyone in Arizona who did not pay their tort judgment debts, regardless of their bankruptcy status. 402 U.S. at 641-42. The FCC's attempt to use *Perez* to narrow the statutory text is thus completely meritless.[18]

D. Nothing In The Second Circuit's Decisions Is Inconsistent With Applying § 525 As Written.

Lacking any support in the text of § 525, Petitioners contend that the Second Circuit's decisions in NextWave's bankruptcy case somehow defeat the application of § 525 here. According to Petitioners, the Second Circuit held that the bankruptcy court lacks the power to "alter or modify" NextWave's debts to the FCC, thus establishing that the debts are not "dischargeable *in the case under this title*," 11 U.S.C. § 525(a) (emphasis added). FCC Br. 30; *see also id.* at 16, 20; Arctic Slope Br. 30. That argument fails for three reasons: (i) the text of the Bankruptcy Code conclusively establishes that NextWave's debts to the FCC are dischargeable in its bankruptcy case; (ii) the Second Circuit never held that the bankruptcy court lacks the power to alter or modify, much less to discharge, the debts; and (iii) Petitioners' misreading of the Second Circuit is no help to them in any event, because a debt can be "dischargeable" even if the bankruptcy court cannot alter or modify it.

1. The plain language of the Code establishes that NextWave's debts to the FCC are dischargeable in the bankruptcy court. Under the Code, debts are discharged by operation of law pursuant to § 1141, which provides that

[18] In all events, this case, like *Perez*, does involve discrimination against bankruptcy debtors insofar as they are penalized for availing themselves of the Code's protections. *See Perez*, 402 U.S. at 651-62 (license denial for non-payment "frustrates" bankruptcy laws). Because a bankruptcy debtor may not make interim payments on pre-petition debts, *see* note 13 *supra*, the relevant comparison is with a non-bankrupt that has satisfied its liability on a debt by payment or otherwise, not with those non-bankrupts that have failed to pay with no legal justification.

"confirmation [of a plan of reorganization] . . . discharges the debtor from *any debt* that arose before the date of such confirmation." 11 U.S.C. § 1141(d)(1)(A) (emphasis added). Plan confirmation is a "core proceeding" within the bankruptcy judge's jurisdiction. 28 U.S.C. § 157(b)(2)(L); *see also id.* §§ 157(b)(2)(I)-(J), 1334. Because NextWave's obligations to the FCC are debts, they are dischargeable in the bankruptcy court case. *See supra* pp. 20-24. The plain meaning of the Code thus forecloses any argument that NextWave's debts are not "dischargeable in the case under this title."[19]

2. ***The Second Circuit did not hold that the bankruptcy court lacks the power to discharge NextWave's debts.*** Contrary to Petitioners' contentions, the Second Circuit did not consider whether NextWave's obligations to the FCC are dischargeable. Pet. App. 127a ("we have no occasion to express an opinion" whether Bankruptcy Code precludes revocation); *see supra* p. 11. Indeed, the words "discharge" and "dischargeable" never appear in either decision. Nor did the Second Circuit mention § 1141(d), which expressly discharges "any" preconfirmation debt. Thus, it is hardly surprising that, after giving the question careful consideration, the D.C. Circuit held that the Second Circuit's decisions have no preclusive effect respecting § 525. Pet. App. 22a-36a.[20] Because Petitioners did not seek certiorari to

[19] Bankruptcy court jurisdiction over proceedings arising under Title 11 – such as plan confirmation and discharge – exists "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district court." 28 U.S.C. § 1334(b); *see id.* § 157. Thus, the bankruptcy court cannot be ousted from its "core" jurisdiction to confirm plans by 28 U.S.C. § 2342 or 47 U.S.C. § 402, which generally give the courts of appeals exclusive jurisdiction to review FCC orders. Indeed, as Petitioners themselves stress, the courts of appeals *lack* jurisdiction to enter orders actually discharging debts, because bankruptcy courts have exclusive jurisdiction to do so. FCC Br. 32; Arctic Slope Br. 32.

[20] The D.C. Circuit also rejected the narrower contention that anything in the Second Circuit's jurisdictional rulings might preclude the bankruptcy court from discharging NextWave's debts to the FCC. Again, the court concluded that there was no preclusion as to that issue, because under at least one reading of the Second Circuit's opinions the debt "*was* dischargeable by the bankruptcy court." *Id.* at 42a. Although the D.C. Circuit acknowledged that some statements by the Second Circuit might suggest that the bankruptcy court could not discharge the debts if NextWave kept the licenses – at least if "discharge" is equated with "alter," *id.*, no preclusion can arise from such ambiguities, *id.* at 36a.

review the D.C. Circuit's ruling rejecting their preclusion argument, they cannot now contend that the Second Circuit's holdings are preclusive. The issue before this Court is what § 525 means, not what the Second Circuit might have meant.

Moreover, the Second Circuit did not hold that the bankruptcy court lacks the power to "alter or modify" NextWave's debt to the FCC. As the D.C. Circuit explained, the Second Circuit merely "held that the Commission's *license cancellation* was a regulatory act reviewable only by a court of appeals." Pet. App. 24a. (emphasis added). The Second Circuit recognized that the bankruptcy court has jurisdiction over the disposition of NextWave's debts for bankruptcy purposes. Pet. App. 236a, 237a. The Second Circuit's consideration of the *merits* of NextWave's avoidance claim, *id.* at 237a-252a, confirms that, under that court's approach, the bankruptcy court *does* retain its ordinary jurisdiction to dispose of NextWave's debts to the FCC, although it lacks jurisdiction to address the regulatory consequences of any adjustment to these debts. Thus, under the Second Circuit's decisions, if the bankruptcy court exercises its jurisdiction to adjust NextWave's debts and the FCC reacts by canceling the licenses, then only a court of appeals could *review the license cancellation* and set it aside if unlawful. But nothing in that division of authority prevents the bankruptcy court from discharging NextWave's debts to the

FCC by confirming a plan of reorganization in the ordinary course of NextWave's bankruptcy proceeding.[21]

In this regard, Petitioners' argument that the *D.C. Circuit* cannot discharge NextWave's debt is a red herring. To be sure, the bankruptcy court has exclusive jurisdiction to enter a confirmation order that actually discharges a debt – as Petitioners themselves recognize. FCC Br. 32; Arctic Slope Br. 32. At the same time, the APA and 47 U.S.C. § 402(b) unambiguously give the *D.C. Circuit* the authority to decide whether the FCC's license revocation violates § 525, and thus to decide whether NextWave's debts are "dischargeable" within the meaning of that provision. *See generally* 4 Collier on Bankruptcy ¶ 523.03, at 523-16 to -17 (15th ed. rev. 2002) (courts other than bankruptcy court have jurisdiction to decide whether debts are "dischargeable").

3. The FCC's misreading of the Second Circuit's decisions does not help it here. Even if the Second Circuit had held that the bankruptcy court lacks the power to "alter" or "modify" NextWave's debts to the FCC, such a holding would not establish that the debts are nondischargeable. Under the Code, discharging a debt does not invariably alter or modify the terms or amount of the debt.

Section 1141 unambiguously provides that confirmation discharges "any" pre-confirmation debt. 11 U.S.C. § 1141(d). It does not distinguish between claims that are altered and those that are left unaltered.[22] Thus, a debt is discharged when a reorganization plan provides for full payment of a

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[21] Such bifurcated jurisdiction is not extraordinary in bankruptcy (although it would not be required here absent the Second Circuit's rulings, *see* 28 U.S.C. § 1334(b)). There are other contexts in which a bankruptcy court may have to stay its hand until another tribunal rules. *See, e.g., Nathanson*, 344 U.S. at 30; 28 U.S.C. § 1334(c)(2); *In re Burger Boys, Inc.*, 183 B.R. 682 (S.D.N.Y. 1994).

[22] Alteration of a creditor's rights is the defining element of impairment, not discharge. 11 U.S.C. § 1124.

claim according to the original terms of the obligation, even though the amount of the debt is not altered or modified by the confirmed plan. *See id.* §§ 1124, 1126(f), 1129, 1141(d). When that occurs, the discharged debt is replaced by a new debt with the same terms. That is because under Chapter 11, "a valid plan substitutes, in much the same way as a common law novation would, the obligations as stated in the plan for all preconfirmation claims and interests." 7 Collier ¶ 1129.01[1], at 1129-12; *accord In re Benjamin Coal Co.*, 978 F.2d 823, 827 (3d Cir. 1992). When a Chapter 11 plan leaves an old debt unaltered, "[t]he effect of confirmation is to discharge the *entire* pre-confirmation debt, *replacing* it with a *new indebtedness* as provided in the confirmed plan." *In re Penrod*, 169 B.R. 910, 916 (Bankr. N.D. Ind. 1994) (emphasis added), *aff'd*, 50 F.3d 459 (7th Cir. 1995). Thus, even if the Second Circuit's decisions were (incorrectly) read to hold that a bankruptcy court may not *alter or modify* NextWave's debts to the FCC, the debts would nevertheless remain *dischargeable*. Indeed, the FCC's approach would result in the anomaly that a debtor would obtain the protections of a bankruptcy discharge – including the shield of § 525 – only if it paid *less* than it originally owed on a claim, but not if the debtor's plan provided for payment of the claim in full.

Finally, Congress's choice of the word "discharge*able*" indicates that § 525 applies to any debt *capable of* being discharged. Even Petitioners concede that under the Second Circuit's rulings, if NextWave surrenders its licenses, "the Bankruptcy Court could deal with that debt [to the FCC] in the bankruptcy case with NextWave's other debts." Arctic Slope Br. 31; FCC Br. 28. That concession demonstrates that, even under Petitioners' view, the debts to the FCC are discharge*able* in the bankruptcy case, and thus are covered by § 525.

II. THE STRUCTURE AND PURPOSES OF THE BANKRUPTCY CODE REINFORCE § 525'S PLAIN MEANING .

The structure and purposes of the Bankruptcy Code underscore the need to give § 525 its plain meaning and deny the FCC's request for a regulatory exception.

A. Section 525 Is An Essential Feature Of The Code's Structural Protection Of The Reorganization Process.

The prime purposes of Chapter 11 are "preserving going concerns and maximizing property available to satisfy creditors." *Bank of Am. Nat'l Trust & Savs. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999); *accord Bildisco*, 465 U.S. at 528; H.R. Rep. No. 95-595, at 220, *reprinted in* 1978 U.S.C.C.A.N. at 6179 (reorganization is "more economically efficient" than liquidation). The Code also seeks to ensure "equality of distribution among creditors of the debtor." *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991).

The Bankruptcy Code forms a comprehensive structural framework designed to promote these objectives. The Code's goals are achieved in a Chapter 11 case through eventual confirmation of a plan of reorganization that restructures all of the debtor's payment obligations in a manner that gives each creditor its due and allows the debtor to emerge as a going concern. To that end, the Code makes an "overall effort to give the debtor-in-possession some flexibility and breathing space." *Bildisco*, 465 U.S. at 532.

Numerous Code provisions work together to protect the debtor's assets and allow for reorganization. The automatic stay bars actions that could interfere with efforts to reorganize, subject only to certain targeted exceptions. 11 U.S.C. § 362; *see also infra* pp. 38-39. The Code also "modifies the procedural rights available to [secured] creditors to protect and satisfy their liens," *Whiting Pools*, 462 U.S. at 206, suspending their rights to proceed against collateral. 11

U.S.C. § 362(a)(4), (a)(5); *id.* § 542(a); *Whiting Pools*, 462 U.S. at 204. Further, the Code prevents preferential transfers of assets to individual creditors. *Bieger v. IRS*, 496 U.S. 53, 58 (1990); *Whiting Pools*, 462 U.S. at 205 & n.10, 208-09.

Similarly, the Code prevents a debtor from being forced to make interim payments to creditors to avoid defaulting on obligations during the case. Sections 1123 and 1124 give debtors a right to cure "any default" at the time of plan confirmation. *See infra* p. 70. The right to cure ensures that the threat of cancellation resulting from default cannot be used to force a debtor to make preferential payments to any creditor to preserve assets before the debtor knows which assets will be needed for the reorganization. *See* S. Rep. No. 95-989, 120 (1978), *reprinted in* U.S.C.C.A.N. at 5906 ("The intervention of bankruptcy and the defaults represent a temporary crisis which the plan of reorganization is intended to clear away . . . . Curing of the default and assumption of the debt in accordance with its terms is an important reorganization technique for dealing with a particular class of claims, especially secured claims.")

Section 365, which governs "executory contracts," provides similar protections. Indeed, although the FCC contends that an "analogy" to executory contracts supports its reading of § 525, FCC Br. 33, the opposite is true: the debtor may ordinarily cure defaults under an executory contract any time up to plan confirmation. 11 U.S.C. §§ 365(b)(1), 1123(b)(2); 3 Collier ¶ 365.05[3][c], at 365-50; *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1215 (7th Cir. 1984).[23]

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[23] Petitioners do not contend spectrum licenses *are* executory contracts, and no court has so held. *See* FCC Br. 33 (arguing "by analogy"); Arctic Slope Br. 30 (government licenses "should not be" considered executory contracts). The FCC did not rely on that argument in its order on review, and it was not presented to or passed on by the court below or raised in the petitions for certiorari. The argument is thus waived. *Lopez v. Davis*, 531 U.S. 230, 244 n.6 (2001). Moreover, it would contradict Petitioners'

Section 525 functions together with these provisions to restrict government actions that can frustrate the reorganization of a regulated entity that has "avail[ed] [it]self of the protection of the bankruptcy laws," H.R. Rep. No. 95-595, at 165, *reprinted in* 1978 U.S.C.C.A.N. at 6126. When any of the prohibitions of § 525 apply, a governmental entity is not permitted to take actions that would prevent a debtor from reorganizing and creditors from obtaining recoveries. Section 525 thus preserves what is often the *sine qua non* of a reorganization – the licensees – thereby protecting the right to cure defaults and guaranteeing the "breathing space" necessary to realize the economic efficiencies of reorganization for the benefit of all creditors. *Bildisco*, 465 U.S. at 532.

The FCC's position, in contrast, demolishes Congress's careful statutory structure. The right to cure defaults, and indeed, the very promise of reorganization, would be extinguished if licensing agencies could revoke essential licenses during the bankruptcy case based solely on a licensee's filing for bankruptcy or not paying a debt while reorganizing.

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position that the licenses are regulatory arrangements rather than ordinary commercial contracts.

Further, an assertion that licenses are executory contracts would require the Court to address circuit splits about § 365 in a case in which the applicability of that section is not even remotely at issue. *Compare* FCC Br. 35 n.11 (arguing that payment obligations under executory contracts are not "debts") *with In re Stewart Foods, Inc.*, 64 F.3d 141, 144-45 (4th Cir. 1995) (rejecting argument); *compare* Arctic Slope Br. 31 n.8 (arguing that debtor cannot assume non-assignable executory contract) *with Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997) (rejecting argument). Petitioners also incorrectly assert that NextWave conceded in its opposition to the petitions for certiorari that obligations under an executory contract are non-dischargeable. FCC Br. 34; Arctic Slope Br. 30 n.7. In fact, NextWave correctly argued that once a debtor assumes a contract, it must perform the contract's original terms – which is separate from the question whether the debts are discharged. NextWave Br. in Opp. 17-18 (making argument in context of agreement to convey spectrum licenses, which could be executory contracts, rather than licenses themselves, which are not).

Equality of distribution would also be defeated, as governmental creditors could use the self-help remedy of license revocation to achieve satisfaction of their claims, leaving nothing to satisfy the claims of other creditors. Worse yet, government entities with claims against the debtor – like the FCC here – could take advantage of the bankruptcy process when it suits them and then opt out the moment doing so would advance their perceived interests.

This case proves the point: the FCC's cancellation of the licenses threatens to derail a reorganization that provides for payment in full to all creditors. The only winner would be the FCC, which would profit enormously while the claims of other creditors would be rendered worthless. Moreover, the FCC used its status as a secured creditor in the Chapter 11 process to its advantage during the period when spectrum values were depressed, *see supra* pp. 7-8, 10, but then sought to exit the process and assert regulatory prerogatives when the value of the licenses had rebounded. Section 525 forecloses that kind of opportunistic conduct.

The Bankruptcy Code is structured to permit businesses to rehabilitate and cure delinquent financial obligations. The import of the FCC's position is effectively to deny a licensee that owes a financial obligation to a licensing authority the opportunity to reorganize under the Code when it encounters a temporary financial crisis. The summary destruction of a debtor solely for failure to satisfy a financial debt to a government agency while in bankruptcy contravenes the very essence of the Code.

B. The Code's Structure Defeats The FCC's Attempt To Create A General Regulatory Exception.

In light of the foregoing, Petitioners cannot come close to meeting their "exceptionally heavy" burden of proving that Congress intended the plain language of § 525 to mean other than what it says. *Wolas*, 502 U.S. at 155-56; *Patterson v. Shumate*, 504 U.S. 753, 760 (1992). The FCC tries to meet that

burden by arguing that applying § 525 according to its terms cannot be reconciled with the "police powers" exception to certain provisions of the automatic stay, 11 U.S.C. § 362(b)(4). FCC Br. 43-47. That argument is meritless.

First, *Davenport* rejected the virtually identical argument that discharge of criminal restitution obligations in Chapter 13 would be inconsistent with the criminal enforcement exception to the automatic stay, § 362(b)(1). As the Court held, the conflict was illusory: "Congress could well have concluded that maintaining criminal prosecutions during bankruptcy proceedings is essential to the functioning of government but that . . . a debtor's interest in full and complete release of his obligations outweighs society's interest in collecting or enforcing a restitution obligation . . . ." 495 U.S. at 561. The same is true here. Congress could readily have concluded that exercising police powers during bankruptcy is important to protect the health and safety of the public, but that a debtor's interest in reorganization and discharge outweighs the government's interest in canceling licenses in response to a narrow range of financial triggers – including non-payment of a dischargeable debt.[24]

Second, the text of § 362 itself refutes the FCC's argument. Section 362(b)(4) exempts a narrowly defined set of regulatory actions from *some* components of the automatic stay, *but not from others*. 11 U.S.C. § 362(b)(4) (exemption from § 362(a)(1), (a)(2), (a)(3), or (a)(6), but not § 362(a)(4), (a)(5), (a)(7), or (a)(8)). Indeed, the FCC's cancellation of NextWave's licenses contravened the automatic stay provisions covering liens, to which the police powers exception

[24] Similarly, in *Kovacs*, the Solicitor General advanced – and the Court rejected – the analogous argument that "it would be anomalous indeed to hold that an action such as the present one is exempt from the automatic stay, which it clearly is, but to rule years later that the debtor's obligation is dischargeable in bankruptcy." Brief for the United States at 16, *Kovacs*, 469 U.S. 274.

does *not* apply. Pet. App. 40a-41a. Moreover, § 362(b)(4) merely provides an exemption from portions of the automatic stay to allow regulatory procedures to go forward; it does not authorize regulatory acts prohibited by other sections of the Code, such as § 525. Nor could it. If the FCC's argument were correct, then any governmental agency could override the Code by asserting a regulatory purpose, a proposition flatly rejected by *Davenport* and *Kovacs*.[25]

When Congress concludes that regulatory interests need protection, it crafts *express* regulatory exceptions. Section 525 itself expressly exempts certain Agriculture Department programs. *Supra* pp. 25-26. Similarly, § 523 exempts certain "regulatory" debts from discharge. 11 U.S.C. § 523(a)(1), (a)(7), (a)(8), (a)(12), (a)(13). The automatic stay, too, contains several specific regulatory exceptions, in addition to the "police powers" exception that Petitioners try to universalize – all of which would be superfluous were the FCC's structural argument correct. *Id.* § 362(b)(8), (b)(12), (b)(13), (b)(16).

The Bankruptcy Code is a statute potentially applicable to every credit transaction, and must remain a stable and predictable set of rules that creditors can rely on for clear notice of how their claims will be treated if a debtor becomes insolvent. This Court has consistently preserved that essential stability and predictability by rejecting government

[25] *Board of Governors v. MCorp Financial, Inc.*, 502 U.S. 32 (1991), is not to the contrary. *MCorp* concerned a bankruptcy court's power to enjoin certain ongoing administrative proceedings, notwithstanding a statute providing that "no court" shall have such jurisdiction. *Id.* at 38-39 (citing 12 U.S.C. § 1818(i)(1)). The Court rejected the argument that § 362(b)(4) *itself* gives the bankruptcy court jurisdiction to engage in substantive review of an agency's actions to determine if they are valid. *Id.* at 40. At the same time, the Court recognized that the bankruptcy court might well have jurisdiction to enjoin an attempt by an agency to *enforce* a final order against a debtor, notwithstanding § 362(b)(4). *Id.* at 40-41. Nothing in *MCorp* suggests that § 362(b)(4) exempts regulatory action from other sections of the Code that apply by their terms.

requests to create implied regulatory exceptions to the Code. *See, e.g., Whiting Pools*, 462 U.S. at 209. It should do the same here.

C. NextWave's Right To Cure Pre-Confirmation Defaults Provides An Independent Basis For Affirmance.

In light of the foregoing, it should not be surprising that § 525 is not the only provision of the Code that prevents the FCC's cancellation of NextWave's licenses. Most obviously, the FCC's actions are contrary to NextWave's right to cure defaults under 11 U.S.C. §§ 1123(a)(5)(G) and 1124(2)(A). These provisions, which NextWave raised below and the D.C. Circuit reserved, Pet. App. 16a, 51a, provide independent grounds for affirmance. Under these sections of the Code, if a debtor's reorganization plan provides for the debtor to cure its pre-confirmation defaults (with interest) under its original agreement with a creditor and resume payments under the original terms going forward, the cure nullifies the defaults and restores the *status quo ante*. "In short, 'curing a default' in Chapter 11 means . . . the event of default is remedied and the consequences are nullified." *In re Taddeo*, 685 F.2d 24, 29 (2d Cir. 1982). Under those conditions, the creditor is not "impaired" and cannot block the debtor's plan. 11 U.S.C. §§ 1124(2), 1126(f); 7 Collier ¶ 1124.01[1], at 1124-3. NextWave's two proposed plans provided for cure of past defaults and payment going forward according to the original terms of the Notes and licenses. The FCC was therefore unimpaired and could not lawfully block those plans. The FCC's attempt to veto the plans by canceling the licenses despite NextWave's cure is exactly the kind of self-help the right to cure forecloses.

III. SECTION 525 DOES NOT CONFLICT WITH THE COMMUNICATIONS ACT.

Unable to carve out a regulatory exception from § 525, the FCC seeks to override that provision entirely by assert-

ing that a straightforward reading of § 525 would create an irreconcilable conflict with the Communications Act – a conflict that can be avoided, the FCC suggests, only by giving § 525 a meaning different from "what the lawmakers must have had in mind." FCC Br. 21 (quotation omitted). But § 525 neither forbids anything the Communications Act requires nor obstructs the FCC's power to fulfill any statutory command.

A. Section 525 Does Not Conflict With Any Requirement Of The Communications Act.

There is no conflict between § 525 and the Communications Act. Section 525 forbids governmental entities from revoking licenses solely because a licensee has filed for bankruptcy or failed to pay a dischargeable debt.

In effect, the FCC is claiming that Congress's enactment of § 309(j) of the Communications Act repealed § 525 to the extent it applies to spectrum auctions. FCC Br. 47-50. But "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 122 S. Ct. 593, 604-05 (2001). Section 309(j) is not "irreconcilable" with § 525. Both statutes are "capable of coexistence," *id.* at 605, because nothing in § 309(j) purports to require that licenses, once awarded to a successful bidder pursuant to an auction, must be revoked solely because the licensee defers a payment while in bankruptcy. Indeed, nothing in the Act requires the FCC to create a creditor-debtor relationship in the first place by offering an installment payment option, *see* 47 U.S.C. § 309(j)(4)(A) (FCC shall "consider" guaranteed installment payments) – as the FCC confirmed by eliminating that option. Section 525 must therefore be given full effect.

What the FCC describes as a "conflict" is nothing more than a preference on its part to revoke spectrum licenses for nonpayment of installment obligations notwithstanding § 525. But the FCC cannot prevail merely by showing that

the Code conflicts with an FCC regulation or policy choice. It is a bedrock principle of administrative law that an agency such as the FCC cannot violate other federal statutes when making policy under its own organic statute. Pursuant to 47 U.S.C. § 402(b), (g), judicial review of FCC licensing determinations is governed by the APA, which requires that a court "hold unlawful and set aside agency action" that is "not in accordance with law." 5 U.S.C. § 706(2). As the D.C. Circuit held, "[t]his provision requires [a court] to invalidate agency action not only if it conflicts with an agency's own statute, but also if it conflicts with another federal law." Pet. App. 36a; *accord Cousins v. Secretary of the United States Dep't of Transp.*, 880 F.2d 603, 608 (1st Cir. 1989) (Breyer, J.).

In *Bildisco*, the Court applied that principle in refusing to enforce an order of the NLRB that was "directly counter to the express provisions of the Bankruptcy Code and to the Code's overall effort to give a debtor-in-possession some flexibility and breathing space." 465 U.S. at 529 n.9. The Court reaffirmed that principle last term in invalidating an NLRB remedial order on the ground that it "trench[ed] upon a federal statute . . . outside the Board's competence to administer." *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S. Ct. 1275, 1282 (2002). When Congress has "directly spoken to the precise question at issue," *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) – whether in the agency's organic statute or in another statute such as the Bankruptcy Code – an agency may not ignore Congress's command.

B. Section 525 Does Not Obstruct The FCC's Exercise Of Its Licensing Or Auction Authority.

Because there is no conflict between § 525 and the Communications Act, the FCC strains to manufacture one. Specifically, the FCC asserts that enforcing § 525 as written will deny the FCC its exclusive authority to issue licenses and its

ability to use auctions to allocate spectrum pursuant to § 309(j) of the Act. Those "conflicts" are illusory.

1. ***Applying § 525 as written does not conflict with the FCC's licensing authority.*** The D.C. Circuit's interpretation of § 525 creates no conflict with the FCC's "exclusive authority to grant telecommunications licenses." FCC Br. 2, 22, 26-28. In challenging the decision, the FCC contends that "a bankruptcy court has no authority to require the Commission to license an entity that is not qualified." *Id.* at 27. But that argument is entirely misplaced. The D.C. Circuit, and not a bankruptcy court, invalidated the revocation of NextWave's licenses. The D.C. Circuit has unquestioned authority to review FCC orders revoking radio spectrum licenses, 47 U.S.C. § 402(b)(5), and to set aside such orders if they are contrary to law, 5 U.S.C. § 706(2); *see* 47 U.S.C. § 402(g). None of the cases selectively quoted by Petitioners suggests that the FCC's licensing decisions are unreviewable or may not be set aside if they violate a federal statute. *See, e.g., Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 10 (1942) (recognizing that court reviewing licensing order has power to "lay[] bare a misconception of law and compel[] correction" by the FCC). The passages quoted by the FCC apply a *different* administrative law principle: in a matter delegated by Congress to an agency for an exercise of *discretion*, the reviewing court may not substitute its discretion for that of the agency. *E.g., id.* at 14; *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946). But the FCC has no discretion to revoke licenses on the basis of criteria that federal statutes forbid.

2. ***Applying § 525 as written does not prevent the FCC from exercising its auction authority.*** Equally unpersuasive is the FCC's contention that § 525 interferes with the FCC's ability to use auctions to allocate spectrum. There is no incompatibility between using auctions to allocate spectrum and applying the bankruptcy laws as written. Nor is there any risk that the bankruptcy laws will facilitate insincere bidding that threatens auction integrity. And the FCC has

ample means to protect its regulatory interests without relying on an automatic cancellation rule that § 525 forbids.

a. There is nothing inconsistent about applying the bankruptcy laws in the context of the "market-based mechanism" – *i.e.*, auctions – by which spectrum licenses are allocated pursuant to § 309(j) of the Act. *See* FCC Br. 22. Far from undermining the efficient allocation of resources, the bankruptcy laws – which form the backdrop for all market transactions – provide an efficient mechanism for dealing with the problem of insolvency and, in Congress's view, prevent market inefficiencies. *See* H.R. Rep. No. 95-595 at 220, *reprinted in* 1978 U.S.C.C.A.N. at 5787. The fact that some successful auction participants may subsequently invoke the protections of bankruptcy to reorganize does not render the auction process unworkable, or impair its accuracy or usefulness as a means for allocating spectrum efficiently.

This is confirmed by recent experience in the capital-intensive telecommunications sector, which is particularly vulnerable in tight capital markets. In recent years, many companies that acquired spectrum licenses via FCC auctions have been forced to reorganize as a result of their inability to obtain financing for needed capital investments. Some of those companies obtained private financing for their licensing obligations. Others, like NextWave, were financed directly by the FCC. The FCC does not suggest, nor could it, that the auction mechanism is in any way imperiled by the fact that licensees may have restructured *private* debt incurred to finance license purchases at auction. Licensees financed by the FCC are no different. Far from threatening the auction process, bankruptcy laws allow the auction mechanism to work in the first place by providing lenders and investors with a stable and predictable framework for protecting their interests in the event of a licensee's insolvency. Unless investors and lenders know they will have the protection of § 525, they will not invest in companies

that rely on an FCC installment payment plan to finance their licenses.

This point applies with particular force in the present context, where – contrary to the FCC's contention – Congress rejected a policy of allocating licenses based only on "willingness and ability to pay the most for the license," FCC Br. 15. When Congress enacted § 309(j), it sought to "avoid[] excessive concentration of licenses," 47 U.S.C. § 309(j)(3)(B), and instructed the FCC to "ensure that small businesses . . . are given the opportunity to participate in the provision of spectrum-based services." *Id.* § 309(j)(4)(D); *see also id.* § 309(j)(3)(B) (FCC should "disseminat[e] licenses among a wide variety of applicants, including small businesses"). The C-Block auction and the installment payment plan at issue here were efforts to further those objectives, not to assign licenses to the giant incumbents willing to pay the most for them.

Given economic realities, Congress was surely aware of the risk that small companies might be unable to raise capital, particularly during tight capital markets or a temporary decline in the market value of the licenses. *See In re Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 9 F.C.C.R. 2348, ¶ 233 (1994) (recognizing that small companies would usually have trouble raising capital *before* auction and would thus be dependent on capital markets *after* auction); H.R. Rep. No. 103-111 at 255, *reprinted in* 1993 U.S.C.C.A.N. at 582 (recognizing that businesses with "a high risk factor" may be appropriate licensees); H.R. Rep. No. 105-801, at 16 (for small businesses, the "only way participating companies could pay for licenses was by accessing the capital markets").

Indeed, the limited capital of small businesses was the very reason Congress directed the FCC to consider installment payment plans. Congress envisioned that the FCC might choose to extend credit to bidders for some licenses.

47 U.S.C. § 309(j)(4)(A); *see also* H.R. Rep. No. 103-111, at 255, *reprinted in* 1993 U.S.C.C.A.N. at 582 (Congress "anticipates that in some instances the Commission will act in a manner that is comparable to a mortgage banker, who designs new mortgage instruments in order to increase the universe of people who can afford to buy homes"). Having authorized debt financing, Congress must have intended that the usual background rules would apply to the resulting debtor-creditor relationships. *See In re Jartran, Inc.*, 732 F.2d 584, 590 (7th Cir. 1984) ("All creditors, to some extent, assume the risk of bankruptcy"); *cf. Franconia Assocs. v. United States*, No. 01-455, 2002 WL 1270248, at *8 (U.S. June 10, 2002) ("when the United States enters into contractual relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals") (quotation and citation omitted).

Application of bankruptcy law in this context furthers congressional intent by ensuring that small businesses without ready capital can obtain breathing room to reorganize during market downturns. In contrast, the FCC's position would frustrate congressional intent, as the fate of the C-Block licensees starkly illustrates. Because of a market downturn, virtually every C-Block licensee either filed for bankruptcy protection or returned licenses to the FCC. *Supra* pp. 5-6 & n.5. And when the FCC reauctioned those licenses, the vast majority ended up in the hands of giants such as Verizon Wireless, *supra* pp. 12-13, resulting in precisely the concentration Congress instructed the FCC to forestall.[26]

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[26] The FCC also asserts that "prompt cancellation of licenses for failure to meet bid obligations facilitates expeditious reclamation and prompt re-auction," thereby speeding provision of competitive wireless services to the public. FCC Br. 25. That claim rings especially hollow here, where the FCC waited 15 months after NextWave did not make its October 1998 installment payment before even beginning the lengthy process of reassigning the licenses to other companies. Indeed, it is striking that the

In view of all of this, Congress's silence in § 309(j) respecting the applicability of the Bankruptcy Code cannot plausibly support an inference that Congress intended to repeal § 525 or any other aspect of the Code. To the contrary, the only plausible inference is an intent that the bankruptcy laws apply as written.[27]

b. Giving effect to § 525's plain terms will not create incentives for insincere bidding. *See* FCC Br. 24. There is simply no realistic prospect of the kind of insincere bidding the FCC posits, as the facts of this case make clear. In order to participate in the C-Block auction and make its down-payments, NextWave raised $600 million in initial financing, from institutional investors such as banks, insurance companies and pension funds, as well as publicly traded telecommunications companies. Such institutions, all of which have fiduciary obligations to their shareholders and investors, would never finance a business whose strategy was (as the FCC hypothesizes) to bid aggressively and rely on the

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FCC conducted a reauction of other C-Block licenses in April 1999, yet made no effort to include NextWave's licenses in that auction. Canceling NextWave's licenses when it had substantially built out its facilities and then reassigning the licenses to existing wireless giants is hardly calculated to speed competitive services to the public.

[27] Petitioners invoke § 309(j)(6), which states that nothing in the "use of competitive bidding" shall "diminish the authority of the Commission . . . to regulate or reclaim spectrum licenses." *See* FCC Br. 47-48; Arctic Slope Br. 24. But the FCC has *never* had authority to "regulate or reclaim spectrum licenses" in violation of § 525. The adoption of competitive bidding did nothing to change that fact, and thus the application of § 525 in this context does not "diminish" any authority that the FCC otherwise possessed or convey any rights that licensees did not otherwise have. *Cf. Kokoszka v. Belford*, 417 U.S. 642, 650-52 (1974) (finding that the Consumer Protection Act was enacted against the background of the Bankruptcy Act and did not alter the protections of bankruptcy).

Bankruptcy Code to save it from the consequences of insolvency.[28]

In all events, relevant provisions of the Bankruptcy Code (which Petitioners ignore) eliminate any incentive for "insincere" bidding. If the value of a bankrupt licensee's spectrum exceeds its debt to the FCC, the licensee will not be able to confirm a plan of reorganization unless the FCC receives full payment (with interest) on its claims. 11 U.S.C. § 506(a), (b); *id.* § 1129(a)(8), (b)(2)(A). In such situations, a licensee has nothing to gain *vis-à-vis* the FCC from having declared bankruptcy. By the same token, if the value of the licensee's spectrum is less than the licensee's debt (and the FCC is thus undersecured), the licensee's investors will risk losing their entire interest if the FCC is not paid in full. *See 203 N. LaSalle*, 526 U.S. at 441-42, 449-58 (explaining operation of "cramdown" provisions, bifurcation of secured claims, and "absolute priority rule"). In other words, if the FCC does not receive payment in full, the original owners of the debtor will be stripped of any exclusive right to retain property, and may lose the right to participate in the reorganized entity at all.[29] Thus, the licensee's owners cannot benefit in the way the FCC posits under any set of circumstances.

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[28] Concerns over gamesmanship are particularly misplaced here, where the government has testified to the absence of any such activity by NextWave. *See Joint Hearing Before the Subcomm. on Commercial and Admin. Law and the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 107th Cong. 33 (Dec. 6, 2001) (statement of John A. Rogovin, Acting FCC General Counsel) ("I have no evidence of any party to the negotiation gaming the system in any way."); *id.* (statement of Jody Hunt) (testifying that "the Department of Justice has no information or evidence at all that anybody was gaming the system").

[29] In *203 North LaSalle*, this Court declined to decide whether the old equity holders are absolutely precluded from obtaining any stake in the reorganized debtor when some dissenting unsecured creditors are not paid in full. 526 U.S. at 451-54. The Court held, however, that to the extent old equity might be able to obtain an interest through new investment, such investment must be subject competing bids or plans. *Id.* at 454-58.

Moreover, in situations where the FCC might be undersecured, Congress has provided additional protections for secured creditors to deal with risk-shifting when the value of their collateral is volatile. For example, under § 1111(b) a secured creditor such as the FCC can make an election requiring the debtor to pay, over time, the principal amount of the underlying debt if the debtor wishes to keep the asset. *See* 11 U.S.C. § 1111(b)(2); 7 Collier ¶¶ 111.03[4], 1111.03[6][b], at 1111-31 to -32, 1111-37. In addition, Congress has provided priority status to the claims of some government agencies, *see, e.g.*, 11 U.S.C. § 507(a)(8), (a)(9), but has not done so for the FCC. If the FCC believes it deserves more favorable treatment than Congress has given it, its remedy is with that body.[30]

c. The Bankruptcy Code also leaves the FCC with a host of practical measures it could take to pursue the statutory goal of ensuring "rapid deployment" of spectrum while electing to use an installment payment system. *Cf.* FCC Br. 25 (citing § 309(j)(3)(A), (4)(A)). Section 525 prohibits the FCC from canceling licenses only when cancellation automatically follows from the debtor's bankruptcy, insolvency, or non-payment of a dischargeable debt. *Supra* pp. 24-28. Section 525 says nothing about license conditions that are unrelated to financial obligations or the declaration of bank-

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[30] Nor does the possibility of an avoidance claim under 11 U.S.C. §§ 544 or 548 facilitate insincere bidding. Although an avoidance claim succeeded in *GWI*, all courts agree that the validity of such a claim depends on the interpretation of FCC regulations that determine when a bidder's payment obligation arises. *See* Pet. App. 240a-241a, 247a; *GWI*, 230 F.3d at 806. By promulgating regulations that *clearly* provide that payment obligations vest when the auction closes – as the FCC previously failed to do, but now has done – the FCC can fully protect itself. *See Kovacs*, 469 U.S. at 286 (O'Connor, J., concurring) (rejecting government's effort to overcome plain language of the Code in light of the government's ability to protect its interest in future cases).

ruptcy. Thus, to encourage rapid deployment and prevent warehousing of spectrum, the FCC can impose construction deadlines that are more rigorous or more frequent than the five-year initial construction deadline that the FCC actually adopted. *See* 47 C.F.R. § 24.203; 47 U.S.C. § 309(j)(4)(B). Further, as the D.C. Circuit recognized, § 525 permits the FCC to adopt a variety of measures to advance its regulatory interests, including "requiring winning bidders to obtain third party guarantees for their license fee obligations," Pet. App. 50a, a solution Congress itself proposed, 47 U.S.C. § 309(j)(4)(A) (FCC must consider "*guaranteed* installment payments") (emphasis added); helping bidders obtain loans privately, as the Small Business Administration often does, *see* 15 U.S.C. § 636(a); or requiring larger up front payments. *See* Pet. App. 50a (listing numerous options).

Forsaking these practical alternatives, the FCC chose instead to make non-payment by a debtor in bankruptcy the sole trigger for revocation. This case amply demonstrates that allowing the FCC to do that would give the FCC free reign to plunder the estate, advance its own interests to the detriment of debtors and other creditors, upset the careful policy decisions Congress made in the Code, and derail the reorganization of precisely the sort of business that Congress expressly sought to foster in the Communications Act. NextWave was ready in January 2000 and again in August 2001 to pay all creditors in full and emerge from bankruptcy to compete in the wireless market. It stands ready to do so today. That is precisely the result that Congress intended when it adopted § 525.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

STATUTORY PROVISIONS INVOLVED

11 U.S.C.A. § 101

UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY

§ 101. Definitions

In this title--

* * * *

(5) "claim" means--

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

* * * *

(12) "debt" means liability on a claim;

* * * *

11 U.S.C.A. § 362

See Pet. App. 417a-426a

11 U.S.C.A. § 506

§ 506. Determination of secured status

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

* * * *

11 U.S.C.A. § 525

§ 525. Protection against discriminatory treatment

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making

appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

* * * *

11 U.S.C.A. § 1111

§ 1111. Claims and interests

(a) A proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated.

(b)(1)(A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim,

whether or not such holder has such recourse, unless--

(i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or

(ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.

(B) A class of claims may not elect application of paragraph (2) of this subsection if--

(i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or

(ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.

(2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.

11 U.S.C.A. § 1123

§ 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall--

* * * *

(5) provide adequate means for the plan's implementation, such as--

* * * *

(G) curing or waiving of any default;

* * * *

11 U.S.C.A. § 1124

§ 1124. Impairment of claims or interests

Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan--

(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default--

(A) cures any such default that occurred before

or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title;

(B) reinstates the maturity of such claim or interest as such maturity existed before such default;

(C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law; and

(D) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

[(3) Repealed. Pub. L. No. 103-394, Title II, § 213(d)(3), Oct. 22, 1994, 108 Stat. 4126]

11 U.S.C.A. § 1126

§ 1126. Acceptance of plan

* * * *

(f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

* * * *

11 U.S.C.A. § 1129

§ 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in,

such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests--

(A) each holder of a claim or interest of such class--

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the

plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests--

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that--

(A) with respect to a claim of a kind specified in section 507(a)(1) or 507(a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive--

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan,

cash on the effective date of the plan equal to the allowed amount of such claim; and

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection

(e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides--

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value

of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims-

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

(C) With respect to a class of interests--

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed

amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

* * * *

11 U.S.C.A. § 1141

§ 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not th e claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of

creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan--

> (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not--
>
> > (i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;
> >
> > (ii) such claim is allowed under section 502 of this title; or
> >
> > (iii) the holder of such claim has accepted the plan; and
>
> (B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if--

> (A) the plan provides for the liquidation of all or substantially all of the property of the estate;

> (B) the debtor does not engage in business after consummation of the plan; and
>
> (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

28 U.S.C.A. § 157

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to-

* * * *

(I) determinations as to the dischargeability of

particular debts;

(J) objections to discharges;

* * * *

(L) confirmations of plans;

* * * *

28 U.S.C.A. § 1334

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

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47 U.S.C.A. § 309

See Pet. App. 448a-469a